THE LEGAL STATUS
OF TRANSSEXUAL AND
TRANSGENDER PERSONS

Edited by
Jens M. Scherpe
The Legal Status of Transsexual and Transgender Persons
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In memory of
Owen Jessep
PREFACE

This book is the result of a research project conducted under the auspices of the Centre for Medical Ethics and Law (CMEL) of the University of Hong Kong, which involved a major international conference on 6 and 7 September 2013 at the University of Hong Kong. It was conceived and planned during my CSAH/CSHSS Early Career Fellowship at the Centre for Research in the Arts, Social Sciences and Humanities (CRASSH), and I am very grateful to the Centre for providing me with the opportunities to work on and discuss my ideas at a very early stage with colleagues from a great number of disciplines. I am equally grateful to my referees for my application for this fellowship, Prof. John Bell (Faculty of Law, University of Cambridge) and Dr Jude Browne (The Jessica and Peter Frankopan Director of the University of Cambridge Centre for Gender Studies), not only for their references but also their continuing support. The project also built on a previous event, the Symposium ‘Challenging Gender, Gender Challenges’, held as the St John’s College Martin Lectures at the University of Hong Kong on 11 December 2010 and very generously supported by St John’s College/University of Hong Kong and particularly the Master of the College, Rev. Dr Eric Chong.

The support the project has received in Hong Kong was overwhelming, and I would like to thank (in no particular order) Prof. Scott Veitch, Prof. Philip Beh, Prof. Johannes Chan, Prof. Marco Wan (all of the University of Hong Kong), Dr Chih-hsing Ho (now at the Academia Sinica, Taiwan), Dr Anthony Ng (Wyng Foundation), Michael Vidler (Vidler & Co), Rev. Dr Eric Chong (Master of St. John’s College/University of Hong Kong), the students of the 2013 ‘Comparative Family Law’ class at the University of Hong Kong, Earl Deng (barrister-at-law, Chambers of Denis Chang QC SC), Marco Chan, Au Yun Ling, and particularly Polly Yiu who at the time was the administrator of the Centre for Medical Ethics and Law (CMEL) and who managed the conference with all its difficulties with almost superhuman efficiency.

I would also like to thank the chairpersons of the conference panels Dr Albert Yuen, Michael Vidler, Dr Keith Hotten, Dr York Chow (in his capacity as the chairperson of the Equal Opportunities Commission), Tim Amos QC, The Honourable Anna Wu and Dr Margaret Ng for their excellent work in ensuring that the speakers stuck to their allocated time and for leading the extremely interesting discussions with the audience.

Massive thanks are also owed to all contributors for their patience – finalising this project, for a number of reasons, took much longer than expected – not least because the laws in this area are in a state of flux and I endeavoured to have the
book be as up-to-date as possible. That is why reports on Denmark, Argentina and Taiwan were added at a later stage.

The Isaac Newton Trust and Philomathia Social Sciences Research Programme awarded grants which were essential in paying for the required editorial assistance.

The editing was undertaken by Peter Dunne, who I first met when he was an LLM student at the University of Cambridge and who currently is writing his PhD at Trinity College Dublin on ‘The Legal Recognition of Gender Identity: A Human Rights Model’. There could not have been a person on this planet more suited to providing the editorial assistance for this project, and I am extremely grateful for Peter’s hard work. However, Peter soon provided much more for this project, and in our discussions of the chapters and the editing his vast expertise in the field was absolutely invaluable. Therefore it was only a logical step for me to ask him to become the co-author of the final chapter. I was delighted that he accepted, and the co-authorship proved to be enormously fruitful and I truly enjoyed our many – very detailed – discussions about the issues.

The publisher, Intersentia, of course is the world’s leading publishing house for comparative family law, and I was delighted when Hans Kluwer (despite initial scepticism!) agreed to publish the book and would like to thank him for being willing to take the risk. At Intersentia’s Cambridge office the book project was managed perfectly by Ann-Christin Maak-Scherpe and Rebecca Pound, and I am particularly grateful for their tolerance and understanding when the project was delayed several times.

On a personal level this project was a difficult one in many ways. One of them was that I was subjected to verbal abuse by a significant number of people merely because I was undertaking this project. The abuse ranged from simple insults to more serious ones but also included threats to me personally. On the other hand I have also received many very personal and very supportive letters and emails (for which I am very grateful and would like to thank the writers again). But these reactions just confirmed that the discussions contained in this book are of great importance, and certainly not only for the persons concerned but for societies as a whole, and that made me even more determined to get this book published.1 I sincerely hope that the present book will make a positive contribution to the discussions on this issue around the globe, and hopefully a contribution to improve the lives of those directly concerned.

Jens M. Scherpe
Cambridge, 15 October 2015

1 I would also like to use this opportunity to mention and recommend a non-academic publication on transgender issues – indeed a children’s book: ‘Introducing Teddy’, written by Jessica Walton and illustrated by Dougal MacPherson (self-published in 2015, and to be published by Bloomsbury in 2016).
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THE LEGAL STATUS OF TRANSSEXUAL AND TRANSGENDER PERSONS IN TAIWAN

Chih-hsing Ho

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I. INTRODUCTION

On Christmas Day 2014, Taiwan’s Ministry of Interior announced a breakthrough change on the criteria for transgender people to obtain the recognition of their preferred legal gender. This decision reverses a previous administrative order issued in 2008 that requires psychiatric evaluation and the surgical removal of reproductive organs before transgender citizens can amend their legal gender markers on their identification cards. The decision, like a belated Christmas gift, is not only a triumph for human rights development in Taiwan, but also represents a momentous step forward for transgender rights in Asia. The government has agreed to come up with alternative criteria in a month by setting up a committee to review the application for obtaining legal gender recognition but separating this procedure from medical treatment. In the near future, those who are aged 18
or above and would like to apply for the recognition of their preferred legal gender will only need to file applications to the committee and will be given a six-month consideration period before their preferred genders are legally recognised.

This chapter discusses the legal status of transsexual and transgender persons in the Taiwanese reality and illustrates how the current situation was reached after a long struggle and human rights law development. It first introduces the general legal framework, statistics, and health insurance issues related to transgender persons. It then analyses the legal procedure and requirements for obtaining legal gender recognition. Finally, the chapter discusses the consequences of gender recognition in Taiwan, including the impact on existing and future legal relationships such as marriage and adoption, rights, duties, and entitlements.

II. THE LEGAL FRAMEWORK AND STATISTICS

The term ‘transgender’ mainly describes people whose gender identities are incongruent with the biological sex assigned to them at birth. Gender, according to the World Health Organisation (WHO), refers to the ‘socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women’.1 Compared to the social characteristics of gender, the notion of sex is largely associated with a person’s biological characteristics. For the WHO, the term ‘sex’ refers to ‘the biological and physiological characteristics that define men and women’.2 So, while a person’s biological sex can be categorised as ‘male’ or ‘female’, her or his gender identity may not fit in this traditional biological binary. For a long period of time, incongruence between a person’s gender identity and birth-assigned sex had been deemed by psychiatrists and health professionals to be a disorder, requiring to be ‘healed’ through hormone replacement therapy and/or sex affirmation surgery. In May, 2013, the American Psychiatric Association (APA) published the fifth edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-5). In this latest edition of the manual, APA has adopted a new diagnostic class of ‘gender dysphoria’ to replace ‘gender identity disorder’ (GID), which had previously been included in the DSM-IV, where an individual’s birth-assigned gender and self-identified gender are incongruent. The 2013 revision of the diagnostic class reflects, on the one hand, a desire among health professionals to adopt terminology which both captures the lived experience of transgender persons and reduces stigma around non-binary gender identities, and, on the other hand, to ensure transgender persons can access insurance coverage for necessary medical treatment and clinical care.3

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1 The statement is given by WHO when it tries to make a distinction between sex and gender. For more information, see: <www.who.int/gender/whatisgender/en/> accessed 25.05.2015.
2 Ibid.
3 In DSM-5, Gender Dysphoria has its own chapter which is separated from Sexual Dysfunctions and Paraphilic Disorders. In the discussions carried out by the Sexual and Gender Identity
Persons whose gender identity does not conform to their birth-assigned gender may want to establish a new gender status that accords with their preferred gender identity. With regard to the legal regulation of gender, whether and how jurisdictions recognise a person's preferred gender, which is beyond the typical categories of 'man' and 'woman', influences the rights and responsibilities of transgender persons. In some jurisdictions, a specific statute may be enacted to regulate requests for legal gender recognition. In other jurisdictions, administrative rules or court practices are part of the recognition process.

In Taiwan, there is no specific statute that deals with the rights and responsibilities of transsexual and transgender persons. The Constitution does not expressly mention gender identity and sexual orientation as grounds for non-discrimination. In 1988, Taiwan allowed its first legal sex affirmation surgery. Since that time, the government has created an administrative process to enable transgender persons to apply for an amendment to the gender marker on their Household Registration Certificates (HRC) and National Identification Cards (NIC). Before 2008, applicants for amendments to the HRC and NIC were required to complete an extensive process that includes a mental health assessment by two psychiatrists, the removal of reproductive organs, and sex affirmation surgery. In 2008, however, the Ministry of Interior (MOI) issued an administrative order – documented No. 0970066240 – which softened the requirements for obtaining legal gender recognition (on the HRC and NIC). According to this executive rule, the completion of sex affirmation surgery is no longer necessary for those who would like to apply for the amendment. However, both medical evaluation and removal of reproductive organs are still preconditions.

As the 2008 administrative order leads to the sterilisation of those who applied for amendment of the HRC and NIC, many human rights groups and NGOs in Taiwan have criticised this administrative rule as a violation of human

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Disorders Work Group, it is noted that replacing 'disorder' with 'dysphoria' helps remove the connotation that the patient is considered to be 'disorder' but not remove the condition as a psychiatric diagnosis so without jeopardising access to care for those who need. For more information, see: Gender Dysphoria, DSM-5, American Psychiatric Association 2013 <www.dsm5.org/documents/gender%20dysphoria%20fact%20sheet.pdf> accessed 25.05.2015.

For example, the Gender Recognition Act 2004 in the UK illustrates the enactment of a specific legislation that provides a mechanism for transgender persons to apply for gender recognition certificate without going through surgical and hormonal treatment. The Act was enacted as a response to Goodwin v UK in which the European Court of Human Rights (ECHR) found that the previous UK case law in relation to transsexuals was in violation of Article 8 of the European Convention on the right to respect for private and family life. The Court further ruled that the states have positive obligations to grant legal recognition of transsexual persons and transsexuals are entitled to marry in their acquired gender.

The first sex reassignment surgery was performed by the Taipei Veterans General Hospital (TVGH) in 1988. For more information, see: J. Lee, 'More Men Than Women Seek Sex Change: Study', The China Post, 8 October 2013. However, the first case requesting transsexual change was reported a few years earlier in 1976. See: W. Chen, 'Shadow Report on Governmental CEDAW: Human Rights of Transgender People in Taiwan', Transgender Funk Activist, Taipei, February 2014.
dignity and the reproductive rights of transgender persons. It is worth noting that the Constitution in Taiwan does not refer specially to the notion of human dignity. However, in the Interpretation No. 603 of the Constitutional Court, the Grand Justices interpreted the preservation of human dignity as the core value of the constitutional structure of free democracy. In addition, the 2008 administrative order has been challenged as a violation of the principle of legal reservation, pursuant to which the administration is entitled to set up rules to restrict people's rights and obligations if, and only if, that is permitted by law. Even though the right to health is not among those rights specifically enumerated in the Constitution, such a right can be considered as a fundamental right for human dignity that is protected by the General Clause under Article 22 of the Constitution in Taiwan. According to Article 22, all other rights that are not enumerated in the Constitution shall be guaranteed and be protected so long as they are not detrimental to social order and public welfare.

Unlike some other jurisdictions that rely on specific legal statutes or courts practices to address inequality and the protection of the rights of transgender individuals, in Taiwan, the empowerment of transgender persons is more like a bottom-up process. NGOs in Taiwan play an active and important role in making international human rights law a vehicle for local transgender empowerment. In recent years, in order to ease diplomatic isolation and improve domestic human rights developments, even though Taiwan is not a member of the United Nations, the Taiwanese government has ratified several international human rights treaties with the aim of incorporating them into the domestic laws regime. These international agreements include the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

These recently ratified international human rights conventions provide useful criteria against which local NGOs and human rights groups can measure existing administrative rules in Taiwan. For example, Article 2 of the ICCPR prohibits discrimination on grounds such as 'race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status'. For transgender rights advocates and NGOs, the term 'other status' implies that the protected grounds enumerated in Article 2 are not exhaustive. As a result, they claim that gender identity and sexual orientation should also be considered as grounds against which discrimination by law and administrative rules should be prohibited.

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6 Article 2 of the International Covenant on Civil and Political Rights (ICCPR)
7 For example, in the 2014 CEDAW shadow report published by the Intersex, Transgender and Transsexual People Care Association (ISTScare) in Taiwan, the international conventions of ICCPR and ICESCR were introduced as important criteria against which existing administrative rules in Taiwan can be examined.
In addition, in terms of specific rights guaranteed by the newly ratified international agreements, Article 7 of the ICCPR also states that, without free consent, no one shall be subjected to cruel, inhuman and degrading treatment. This is particularly relevant to the requirement that transgender persons submit to sex affirmation surgery as they would not normally give their full consent. For transgender rights activists, gender identity relates to one's personal conception of self and, as a result, recognition of that conception should be respected rather than decided by government authorities. That further echoes Article 5 of CEDAW which requires state parties to take appropriate measures to eliminate prejudice and address cultural and social patterns that reinforce sex role stereotyping in society.

In December 2013, following a suggestion by the Presidential Office Human Rights Consultative Committee, the Ministry of Health and Welfare organised a forum meeting, together with local NGOs, experts, and medical professionals, to discuss the possibility of allowing transgender individuals to obtain legal recognition without requiring surgery or other medical intervention, including a psychiatric diagnosis. There was a general consensus reached at the meeting that it would be preferable to revise the current administrative rules, which, as noted, mandate two affidavits from certified psychiatrists and surgery to remove reproductive organs. Even though such consensus has been reached, how it is implemented remains a practical issue. On 17 January 2014, the Taiwanese Society of Psychiatry further announced its statement with regards to the medical requirements such as mental diagnosis for legal gender recognition. The Society suggested that the government should not continue to consider gender identity as something needing to be treated. Rather, it was said to be worth considering annulling the psychiatric diagnosis as one of the criteria for transgender people to obtain their preferred legal gender. Several months later, in June 2014, the Review Committee for the Taiwan CEDAW 2nd Report made a list of issues and questions for the Taiwanese government and required it to provide updated information on how the better protection of the rights of transgender individuals it once promised had been carried out. The Committee clearly indicated that the 2008 administrative order was discriminatory and a violation of the CEDAW. It further suggested that the government should take action based on the consensus reached in the meeting of the Ministry of Health and Welfare in order to respect the gender identities of transgender persons.

In October 2014, the government made a list of responses to the CEDAW Review Committee’s suggestions. The Ministry of Health and Welfare was requested to propose to the Ministry of Interior its own criteria for the recognition of transsexual and transgender people. The Ministry of Interior was expected to

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Taiwan to allow legal gender changes without transitioning – see more info at: <www.gaystarnews.com/article/taiwan-allows-legal-gender-changes-without-transitioning_091213#sthash.Eqqvmk7t.dpuf> accessed 25.05.2015.
set up implementing rules based on the suggestion and to re-evaluate what would be suitable legal procedures for the recognition of legal gender.

2.1. NATIONAL HEALTH INSURANCE

In Taiwan, under Article 51 III of the National Health Insurance Law, health care related to medical treatment for transgender persons is not covered by the national health insurance (NHI) scheme. The cost of sex affirmation surgery can be very expensive in Taiwan. According to a shadow report prepared for the CEDAW Committee by the group Transgender Punk Activist, medical expenses for male-to-female (MtF) sex affirmation surgery can reach as high as NTD 400,000 (USD 13,000). That is equivalent to approximately three years’ savings for a person who earns above-average income in Taiwan. In medical practices, the cost of female-to-male (FtM) sex affirmation surgery may be even higher, reaching as much as NTD 700,000 (USD 23,000). The increase in costs for FtM individuals is due to the complexity of the surgery. Before 2008, genital surgery was a precondition for obtaining legal gender recognition. This was despite the fact that many transgender persons do not want or are unable to submit to such surgery.

Taiwan started its compulsory national health insurance service in 1995. Prior to that, the health service in Taiwan was implemented by various public and private insurance groups and there was no universal and compulsory health insurance service. The NHI is a single-payer social insurance scheme that is mainly financed through the insurers’ premiums, obtained from the payroll tax with a partial supplement from government funding. This scheme combines the population of Taiwan into a single client and centralises public and private health care funds into a single payer. In 2014, the National Health Insurance reached a population coverage of 99%. This is out of a total population of 23.4 million Taiwanese people. However, even though the NHI’s coverage rate is high, and the benefit package of NHI is comprehensive, including traditional Chinese medicine and some drug treatments for rare diseases and target therapy, the health service does not cover genital and breast surgery for transgender persons. Such surgery has been deemed to be a cosmetic surgery that is a resolution of a personal predicament. For transgender groups and NGOs, if surgery was necessary to obtain recognition, then there arguably would be no case for excluding it from the NHI. To hold otherwise would create a situation where only those individuals with sufficient resources would have their preferred gender recognised in law.

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9 See CHEN, above n. 5.
10 It was compared to the insurance coverage rate of 59% in 1995, before the health insurance plan started.
11 CHEN, above n. 5.
2.2. STATISTICAL INFORMATION

There is no official statistical information provided by the government about transgender persons in Taiwan. As far back as 1989, a psychiatrist at the National Taiwan University Hospital estimated that the percentage of transgender people in Taiwan was 0.0097%.\(^\text{12}\) The statistics further calculated the prevalence of male-to-female ’transsexualism’ in Taiwan at 1 in 37,000 and female-to-male at 1 in 107,000.\(^\text{13}\) According to another medical journal published in 2006, the percentage for transgender people in urban cities, towns and countries in Taiwan was 0.06%, 0.20%, and 0.03% respectively.\(^\text{14}\) Similar statistics in 2008 demonstrated that there were 30–200 transgender persons among each 100,000 people within the total population.\(^\text{15}\) According to this percentage, the prevalence of transgender people in Taiwan was estimated in the range of 6,900–46,000 people.

III. CHANGING LEGAL SEX AND/OR GENDER – PROCEDURE AND REQUIREMENTS

3.1. LEGAL PROCEDURE AND REQUIREMENTS

Before 2008, people who wished to obtain legal gender recognition in Taiwan needed to satisfy the following conditions:

1. they are diagnosed as ‘primary transsexuals’;\(^\text{16}\)
2. they are at least 20 years old;
3. they have lived at least two full years in their acquired gender and they intend to live permanently in their acquired gender for the rest of their lives;
4. they have undergone gender affirmation surgery; and
5. they have support from their parents and families.

The requirements for obtaining legal gender recognition vary immensely across jurisdictions (as is illustrated by the various chapters in this volume). During the 1980s, Taiwan had developed its own criteria for psychiatric diagnosis about

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\(^{12}\) S.-N. Tsai, 'Medical Legal and Ethical Analysis of Transgender Persons' (2008) Taiwan Law Journal 74.

\(^{13}\) Ibid.


\(^{15}\) Ibid.

\(^{16}\) According to Harry Benjamin's Standards of Care for Gender Identity Disorders, primary transsexuals are diagnosed as who recalled the feelings about their gender incongruence at their earliest ages that can be distinguished from secondary transsexuals who became aware of their gender incongruence at their later ages. However, such distinction has been criticised as not a proper diagnostic classification for the suitability for gender affirmation surgery.
transgender persons. The criteria for the diagnosis of gender identity disorder combined the Harry Benjamin's International Gender Dysphoria Association's (now the World Professional Association for Transgender Health (WPATH)) Standards of Care for Gender Identity Disorders (SOC, sixth version) and the Third Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-III) published by APA. Under the criteria, it would take at least two years for a transgender individual to complete the required psychological counselling and living period (in the preferred gender), the so-called real life experience (RLE) test before the person could access hormone replacement therapy (HRT) and/or sex affirmation surgery (SAS). In addition, parents and spouses’ consent was usually considered in medical practice as one of the conditions for carrying out surgery, even though there were no further restrictions with regard to marital status, nationality and habitual residence.

After 2008, sex affirmation surgery no longer was a requirement for legal gender recognition. As stated earlier, in November 2008, the Ministry of Interior issued an administrative order No. 0970066240 according to which legal gender recognition is required to be registered with household registration offices under the following conditions:

(a) For FtM individuals, they are required to submit to the authority affidavits of a mental assessment from two psychiatrists and medical certification proving the completion of the surgical removal of female reproductive organs, including breasts, uterus and ovaries, by an accredited medical hospital or clinic.

(b) For MtF individuals, they are required to submit affidavits of a mental assessment from two psychiatrists and medical certification of the completion of the surgical removal of the male reproductive organs, including penis and testicles, by an accredited medical hospital or clinic.

The authority mentioned in the administrative order refers to the Household Registration Bureau which is in charge of the procedures for registration of legal gender recognition. It is worth noting that, unlike some other jurisdictions, changing registered information on Household Registration Certificates and National Identification Cards in Taiwan need not involve a court. The household registration agencies are required to register legal gender recognition so long as applicants have submitted the required affidavits and medical certification. Applicants can appeal against administrative a decision made by the Household Registration Bureau to refuse registration.
3.2. OFFICIAL DOCUMENTS

In Taiwan, household registration is required by law. Household Registration Certificates and National Identification Cards are foundational documents for proof of identity. These two documents are often requested for official purposes, such as voting and opening bank accounts, and can be considered as the main identity documents in Taiwan. Additional official documents, such as driving licences and educational certificates, are issued on the basis of Household Registration Certificates and National Identification Cards. Obtaining a National Identification Card in Taiwan requires proper household registration. However, unlike the hukou system in China, household registration in Taiwan does not function as a tool by which the government controls and manages population movement. Under the Household Registration Act, any birth in Taiwan must be registered within 60 days.\(^\text{17}\) As the Ministry of Interior's household registration system is digitally linked with all other legal documents, the gender assigned and registered at birth will first need to be amended at the household registration agency, where the applicant's place of domicile is registered, before the applicant can change the gender marker on any other official document or paper.

In administrative practice, for an applicant who applies for legal gender recognition, the first step at the Household Registration Bureau is to amend the National Identification Number on his or her ID card. An ID card is mandatory for nationals who have household registration in Taiwan and who are aged 14 years or older. Every ID card holder has a unique ID number which consists of one English letter followed by nine Arabic numerals. The English letter refers to the ID holder's birth place, usually the first location of the card holder's household registration, and the first Arabic number denotes the gender of the ID card holder – 1 for male, and 2 for female. After the original ID number has been annulled, a new National Identification Number will be issued to the applicant and the items recorded on the household registration record, such as legal gender and the titles for the sibling relations, can be altered after the new ID number is issued. However, the photo shown on the ID card is required to be consistent with 'biological sex' rather than legal gender. This requirement can cause inconvenience for transgender persons.

A household registration record includes a person's name, gender, date of birth, parents, spouse and residency. Under the Household Registration Act, an individual is required to make a registration at a household registration office upon the following events: birth, death, marriage, adoption, guardianship, change of residency and name, and obtaining legal gender recognition. The system of household registration (hukou) in Taiwan can be traced back to the Japanese colonial period (1895–1945). The system was established in 1906 by categorising residents into two broad groups – local residents and temporary

\(^{17}\) Article 48 of the Household Registration Act.
residents.\textsuperscript{18} Even though the household survey was the responsibility of the police during that time, household registration was mainly carried out by clerks of the local Baojia authorities.\textsuperscript{19} Invented in the Song Dynasty (960–1279) in Imperial China, Baojia was a community-based system designed for law enforcement and civil control. The system gave ‘bao’, which was composed of several families, the authority to maintain local order and organise civil projects in order to reduce the central government’s financial burden of reliance on mercenaries. It transferred responsibility for law enforcement from the central government to civil societies.\textsuperscript{20}

The Baojia system was in operation in Taiwan even during the period of Japanese colonisation. Later, the Household Registration Act was enacted by the ROC government in 1931, but it was not implemented in Taiwan until 1946, after Taiwan was restored to the ROC government after World War II. According to the Act, household registration was governed by the civil administration authority. But in reality, between 1973 and 1992, household registration was under the supervision of the police authority in Taiwan.\textsuperscript{21} In 1985, the computerisation of the household registration was initiated under a trial scheme. After a decade, household registration data was fully digitised. It has been online nationwide since 1997.\textsuperscript{22} Digitisation ensures that the household registration data can be archived in an electronic database that makes data sharing and linkage possible, even though it also causes anxieties about the infringement of privacy.

In order to protect the privacy of individuals who apply for legal gender recognition, the Ministry of Interior issued an administrative order, documented No. 547743, that allows applicants to request a new Household Registration Transcript to be issued. Legal gender recognition can be recorded only on the notes of the de-registered Household Registration Transcript for reference, though the original data will be retained. However, by so doing, the registered records of the change of legal gender on the transcript still cannot be covered completely. In addition, under the Personal Data Protection Act in Taiwan, the records of sex and/or gender on the official documents are not regarded as personal data to be protected, even though National Identification Numbers and other identifiable personal data on medical records are protected by the Act.

\textsuperscript{18} The system was introduced by Wang Anshi in his implementation of the seven-year New Policies reform.
\textsuperscript{20} Ibid. In the Song Dynasty, the basic unit of a ‘bao’ consisted of ten families. In the Ming Dynasty (1368–1644), the family was relabelled as a ‘jia’ and a ‘bao’ usually consisted of ten Jia or one hundred families. Even though the structure of the system changed overtime, the Baojia had been an important way of governance in Imperial China to hold the Chinese society altogether.
\textsuperscript{21} For more information about the history of the household registration in Taiwan, see <www.ris.gov.tw/18j/sessionid=404867C80733D790AE07D6E6CC122FAD> accessed 25.05.2015.
\textsuperscript{22} Ibid.
IV. CONSEQUENCES OF THE CHANGE OF LEGAL SEX AND/OR LEGAL GENDER

4.1. MARRIAGE

Under the Taiwan Civil Code, an agreement to marry shall be made between a man and a woman. Even though same-sex marriages have been publically discussed within Taiwanese society, they have not yet been legally recognised (nor have registered (civil) partnerships). In Taiwan, transgender persons have the right to enter into a marriage so long as the marriage satisfies the statutory conditions set out in the Civil Code. Before 2008, a marriage had to be celebrated by open ceremonies in the presence of at least two witnesses. For persons who had only registered for marriages with the Household Registration Bureau, but not celebrated their marriages by open ceremonies with two witnesses, they were assumed to have married. Effective from May 2008, Taiwan amended the Civil Code and changed the requirements for the validity of marriage, adopting a registration system. Since then, a marriage must be registered with the Household Registration Bureau in order to be considered as a valid union.

In summer 2013, a marriage between two transgender women attracted significant attention. Abbygail Wu and Jiyi Wu both had transitioned from male to female (MtF) and submitted to sex affirmation surgery. They married in 2012 but Jiyi Wu had not registered the legal recognition of her preferred gender with the Household Registration Bureau until a year later in 2013. According to the Taiwan Civil Code, a marriage may exist only between one man and one woman. As Jiyi Wu still retained her male status at the time of her marriage, when her spouse Abbygail Wu had a female legal gender, the Wus’ marriage was recognised as a legal union because they satisfied the Civil Code. Later, Jiyi Wu applied for legal gender recognition. This application caused a dispute with regard to the validity of the existing marriage.

In June 2013, the Ministry of Interior demanded annulment of the Wus’ marriage, based on the fact that, although Jiyi Wu had not yet completed registration, she had undergone sex affirmation surgery prior to her marriage. As both individuals were said to be ‘physically female’ at the time of their marriage, the Ministry demanded the revocation of the marriage registration and gave the couple a period of time to annul their marriage. The Ministry argued that the union violated the requirement that there be one man and one woman for a valid legal marriage. The decision to revoke the marriage licence was met with much criticism and public disapproval. On 7 August 2013, the Ministry of Interior held a conference investigating the Wus’ case, and following a marathon meeting

- Article 972 of the Taiwan Civil Code.
- Article 982 of the Taiwan Civil Code.
- Ibid.
with governmental officials and NGOs from the transgender rights movement, the authority finally decided to change its original decision. The Ministry thus accepted the validity of the couple's existing marriage. This decision indicates that, for the interpretation of heterosexual couples for a marriage to be recognised as a legal union in Taiwan, it refers to legal genders recorded in the Household Registration Transcripts rather than biological sex. However, even though the Wus' marriage was recognised by the Ministry of Interior as a legal union, the 'one man and one woman' rule set out in Article 972 of the Civil Code has further demonstrated a conservative mindset among the judicial and governmental administration towards marriage formation in Taiwan.

In recent years, there have been increasing calls to revise Article 972 of the Taiwan Civil Code. At the end of 2013, a campaign for 'diverse families', organised by the Taiwan Alliance to Promote Civil Partnership Rights (TAPCPR), attracted nearly 30,000 signatures in support of a proposed revision. The revision would make same-sex marriages and civil partnerships possible in Taiwan. The campaign aims to promote a new system that is more flexible than the traditional institution of marriage recognised by the current Civil Code. It may further open up possibilities to form a legal union for people of all kinds of gender and sexual orientation, including transgender persons. In October 2013, a draft bill for marriage equality was referred to the Judicial Affairs Committee of Legislative Yuan for review. The draft involves phrases and semantic changes, such as changing the wording 'husband and wife' to 'spouse'. Nevertheless, opposition from religious groups towards the draft remains strong. With concerns that the bill would destroy moral values and the foundation of family ethics, the Taiwan Family Alliance called for another petition for the public to support the traditional institution of marriage of one man and one woman. The bill is still in the process of review in the Legislative Yuan at the point of writing. It has not yet been approved by legislators in Taiwan.

4.2. PARENTHOOD AND ADOPTION

Under the Taiwan Civil Code, several statutory conditions are listed for prospective adoptive parents. For example, adoptive parents must have legitimate work, a stable residence and must be at least 20 years older than the child to be adopted. In addition, only a married couple can adopt a child or an adult jointly. On the other hand, no child adopted may be directly related by blood

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26 In Chinese, it is called '多元成家' (Pinyin: Duo Yuan Cheng Jia); other translations for this term include 'diverse family' and 'multi-person household'.
28 Article 1073 of the Taiwan Civil Code.
29 Article 1075 of the Taiwan Civil Code.
to the adoptive parents, nor can the adoption be related by marriage, with one exception that the adoption is for the other spouse's child as a stepchild.\textsuperscript{30} Like many other jurisdictions, an agreement for adoption in Taiwan needs to be filed with the courts for approval before it can be executed. In practice, same-gender marriages are generally unsuccessful in Taiwan because same-gender marriage has not yet been introduced. However, a court may grant a favourable decision for adoption by a partner in a same-sex relationship given that the child to be adopted is the biological offspring of one member of the couple.\textsuperscript{31}

In Taiwan, the first case on legal adoption by a transgender person was approved by the District Court in Chiayi in 2002. Chung Ling, 49, was a male-to-female (MtF) transgender individual who had submitted to sex affirmation surgery in Thailand at the age of 26.\textsuperscript{32} After the surgery in Thailand, Chung went back to Taiwan to work and had been employed at several bars. The baby boy Chung adopted was not from Chung's relatives but from a neighbour of Chung's mother. The baby, who suffered from a glucose deficiency, had been abandoned by his biological mother at birth. The adoption process took about five months to complete, including going through a formal assessment from social workers and the completion of registration with the Household Registration Bureau. Under the Taiwan Civil Code, social workers are required to interview families involved in adoption and to provide home visit reports to the court. The social workers assigned to Chung's case made a favourable assessment of Chung's application after interviewing both families and they found that it would be better for the baby boy to live with Chung than with his biological mother, who had alcohol problems. The adoption was completed after Chung registered the case with the household registration office in Chiayi.

Even though Chung's case opens the possibility for transgender persons to adopt, whether an adoptive parent's sexual orientation or gender identity is a factor for consideration ultimately falls within the court's discretion. An earlier 2007 case from a court in Taoyuan, relating to lesbian parenting, demonstrated that a prospective adoptive parent's homosexuality may be viewed by courts as an unfavourable factor. Therefore their petition for adoption could be denied due to gender stereotyping.\textsuperscript{33} In the 2007 case, even though the Court appeared to recognise that homosexual relationships are an expression of personal freedom, the Court nevertheless turned down the petition for adoption based on the application of the so-called 'best interests' doctrine, which has been incorporated

\textsuperscript{30} Article 1077 of Taiwan Civil Code.

\textsuperscript{31} Under Article 1074 of Taiwan Civil Code, adoption from a single person is allowed and therefore even though it is not possible for same-sex couples to jointly adopt a child or an adult in Taiwan, it is still feasible to create a single-parent family for a member of same-sex couples.

\textsuperscript{32} Tsai Wen-ting, "'Her' Story – the Transsexual Chung Ling', \textit{Taiwan Panorama}, November 2002.

\textsuperscript{33} Yun-Hsien Diana Lin, 'Lesbian Parenting in Taiwan: Legal Issues and the Latest Developments', (2013) 14(2) \textit{Asian-Pacific Law & Policy Journal}.
into Taiwan's family law. Under Article 1055-1 of the Taiwan Civil Code, a judge must take account of certain criteria when considering the best interests doctrine. These criteria include, but are not limited to: a prospective adoptive parent's intent and age, gender, occupation, health, character, financial conditions, lifestyle, etc. However, it has been argued that, in this case, the reason for not granting the adoptive petition was not because of any legitimate consideration of the child's best interests. Rather, the Court refused the petition because of a concern that existing homophobic attitudes in society might negatively affect a child who was being reared by two female parents.

4.3. ARTIFICIAL REPRODUCTION

Administrative order No. 0970066240 requires the removal of reproductive organs as a precondition for obtaining legal gender recognition. As surgery leads to infertility, the question is whether the gametes of a person stored before legal gender recognition can be used afterwards to create a child through artificial reproductive technology. On 10 March 2014, the Ministry of Health and Wealth issued an administrative explanation, documented No. 103301001, with regard to the application of the Artificial Reproductive Act to transgender persons. The Act limits the use of assisted human reproduction only to married couples as a medical treatment for infertility. Under the Act, a medical care institution may perform assisted human reproduction for a married couple if, and only if, certain requirements are met. These requirements include that there be ‘a husband or wife of the married couple who has been diagnosed as suffering from infertility’,34 or who has been diagnosed as ‘suffering from a major hereditary disease and it is suspected that natural conception and birth will cause abnormal children’.35 In addition, at least one party of the married couple must possess healthy reproductive cells, so that there is no need for donated sperm or oocytes.

As the Artificial Reproduction Act excludes single women from accessing assisted human reproduction, and uses terminology, such as 'a husband and wife', there is an exclusion of the possibility of recognising diverse family formations. This situation has been criticised as discrimination against unmarried and single people. Under the administrative explanation, documented No. 103301001, the Ministry of Health and Welfare states that, so long as the requirements set by the Act for a married couple are met, even though transgender persons have not yet completed legal gender recognition, a medical care institution can still perform assisted human reproduction for transgender individuals according to the Act.

Article 21 II of the Artificial Reproduction Act enumerates the conditions under which stored reproductive cells have to be destroyed by an artificial

34 Article 11 of the Artificial Reproduction Act.
35 Ibid.
reproduction institution. The conditions include situations where the providers of the reproductive cells have died or have requested destruction. There may be circumstances where the reproductive cells have been preserved for more than ten years but such preservation period can be extended with the written consent of the providers.\textsuperscript{36} Importantly, the Act does not require that legal gender recognition should automatically trigger the destruction of stored cells.

4.4. MILITARY SERVICE

In Taiwan, men aged 19–37 years are required to complete military service with only few exceptions, such as psychological or physical unfitness. In some jurisdictions, like Australia, Canada and the United Kingdom, voluntary military service by transgender individuals is allowed and serving in the armed forces is viewed as a right for transgender persons. Laws that prevent lesbian, gay, and bisexual individuals from enlisting in the armed forces are deemed to be discriminatory in these jurisdictions. For transgender rights advocates in those countries, there is no compelling medical reason that can justify banning transgender participation. In Taiwan, however, transgender citizens are exempted from military service based on the concern that it could cause inconvenience for both transgender and cisgender individuals in their daily military practice.

Some concerns about obtaining the recognition of preferred legal gender have been raised, in particular that it may be used as a way for individuals to avoid compulsory military service in Taiwan. Some voices in Taiwanese society are against the separation of legal gender recognition from gender confirmation surgery. These concerns have been criticised by transgender groups as that would constitute a hindrance for transgender citizens obtaining gender recognition without undergoing unwanted medical treatment. In fact, according to the current practice within the Ministry of Defense, a person who has been diagnosed by psychiatrists as identifying with a gender which does not match their birth-assigned gender will, on the basis of that diagnosis alone, be exempted from military service directly. Therefore, in Taiwan, there is no need to obtain legal gender recognition (from male to female) in order to be exempted from compulsory military service.

V. CONCLUSION

The legal status of transgender persons varies across jurisdictions. In Taiwan, there is no specific statute that deals with a transgender person’s rights and responsibilities. Administrative practices constitute the major framework under

\textsuperscript{36} Article 21 of the Artificial Reproduction Act.
which legal status is recognised. This chapter has introduced the historical development of the law relating to transgender identities in Taiwan. It has discussed the legal procedure and requirements for obtaining gender recognition. Faced with criticism from local NGOs and human rights groups, the Taiwanese government has gradually relaxed its administrative practices in the years since 2008. Most importantly, at the end of 2014 the administrative order that requires psychological evaluation and the removal of reproductive organs has been repealed. Even though Taiwan still has a long way to go in order to achieve full equity and respect for the rights of transgender persons, this recent decision to separate medical treatments from the recognition of preferred gender has been a triumph for human rights development in Taiwan, and represents a momentous step forward for transgender rights in Asia.